Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

October Term, 1996

IN RE ESTATE OF EDNA CLARA REEDY
Deceased

LAWRENCE B. MUCKLOW,
Petitioner,

vs.

SHERRY E. FARROW HARVEY, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA'S SUPREME COURT AND/OR TO ITS FOURTH DISTRICT COURT OF APPEAL, DIV. TWO

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QUESTIONS PRESENTED

1.

Does California's "nonpublication" law [California Rules of Court, rules 976-979] whereby the California Supreme Court can without granting judicial review, and without explaining its reasoning, abrogate the precedential value of an aberrant appellate opinion by making the suspect decision disappear for all except the involved litigants (the "*California vacatur*"), mark an abridgment of important fundamental rights of petition, due process, and equal protection of the laws?

2.

Where a state's legislature and its lower court of appeal have contemporaneously spoken, but inconsistently so, on a questioned matter that is governed by statutory law, not by common law, and a *California vacatur* had been issued on the inconsistent appellate opinion, does the state court of last resort violate its constitutional duty of judicial review when it abstains from adjudicating the re-asserted direct conflict between the judicial construction and legislative clarification of the questioned statute?

3.

Where statutory law, not common law, governs a state's intestate succession law, is the *separation of powers* clause of the Constitution violated by a court decree that directs distribution of an intestate estate to the children of decedent's adopted-out child when the states's legislature has unambiguously legislated that children of adoptees do not inherit from their natural grandparent because the adoption has severed the parent-child relationship through which succession rights flow?

PARTIES TO THE PROCEEDING

Three separate claims are asserted in this probate proceeding:

1. The claim asserted by LAWRENCE B. MUCKLOW,[1] brother of the decedent, reflecting the inheritance interests of decedent's natural relatives, a group of 23 siblings and nieces and nephews, who inherit *if* the decedent left neither spouse nor issue.

2. The claim asserted by VIVIENNE LYNN KIRK (co-appellant below) a grandchild of decedent's pre-deceased husband, who succeeds to half of the former community-property home, *if* the decedent left neither spouse nor issue.

3. The claim asserted by the respondents, SHERRY FARROW HARVEY, THOMAS O. FARROW and JAMES E. FARROW, the three children of an adoptee who profess to be the decedent's biological grandchildren -- and thereon -- claim the entire inheritance as decedent's lawful "*issue.*"

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1. Lawrence B. Mucklow died on January 7, 1995, while this case was pending on appeal; that is, he died after the trial judgment was entered. Under well-settled California law an appeal survives the death of the appellant and may be continued, in the name of the decedent, without a formal substitution of parties. If necessary, at the conclusion of the appeal, a new judgment will be entered *nunc pro tunc*. [California Code of Civil Procedure §669: "If a party dies after trial and submission of the case to a judge sitting without a jury for decision or after a verdict upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon." *Accord*, California Code Civil Procedure §368.5: "[A] proceeding may, on the transfer of any interest in it, be continued in the name of the original party."] Mr. Mucklow's still open probate expressly lists the appeal in his estate. The executor of his estate, Karyn L. Story, has elected to continue the appeal without seeking a change in the name of the parties. To the extent that an affidavit, pursuant to California Code of Civil Procedure §377.32 – setting forth the death and the probate – is advisable, to avoid a plea of abatement, such will be (or has already been) filed. *Note:* §377.32 "does not require that the affidavit be filed as a precedent to commencing or continuing an action." *Parsons v. Tickner* (1955) 31 CA 1513, 1523-1524.

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PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA'S SUPREME COURT AND/OR TO ITS FOURTH DISTRICT COURT OF APPEAL, DIV. TWO

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Petitioner, LAWRENCE B. MUCKLOW, through his appointed representative,[2] prays that a writ of certiorari issue to review the constitutionality of the decisions in this probate case to effect a "*California vacatur*" of the appellate rulings for all, except the litigants, by declining supreme court review but directing "nonpublication" of the opinions.

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2. The Petitioner, who died on January 5, 1995, acts through his appointed representative, Karyn L. Story, in bringing this petition. See, footnote "1" *supra* at page ii.

MATTERS TO BE REVIEWED

Petitioner respectfully requests review of the following:

(1) The decision by the California Supreme Court to abstain from reviewing the appellate opinion which presented a significant "separation of powers" conflict over whether the legislative or the judicial branch of government has the last word on an intestate succession law -- and the allied decision -- not to direct publication of said appellate opinion (so as to, in that way, eliminate the conflict). [*infra,* App 2, Appendix "B"].

(2) The unreported (nonpublished) opinion of the California Court of Appeal, Fourth District, Division Two, which decrees -- a contradictory legislative pronouncement and a prior order to "depublish" such a holding, notwithstanding -- that "the children of an adopted child are entitled to inherit from their biological grandmother." [*infra,* App 3-20, Appendix "C" at App 17].

(3) The decision of said lower appellate court not to certify its opinion for publication and not to grant the requests for its publication (thereby effectively immunizing said opinion against review by the higher court). [*infra,* App 21-22, Appendix "D"].

(4) The underlying requests for publication and objections thereto which set out how and why "nonpublication"(*vacatur*) of the opinion, if upheld, would lead to unequal and unfair application of the law and would be a denial of the constitutionally guaranteed "equal protection" right. [*infra,* App 23-32, Appendix "E"].

(5) The subject California Rules of Court, rules, 976-979, which allows California's court to limit, without any explanation, (if not to cut off completely) a petitioner's First Amendment right of equal access to the state's highest court for a redress of grievances, and permits that court to effect an unfair and unequal application of the law by making aberrant appellate decisions disappear -- for all except the parties -- by denying the petition for review but directing *nonpublication* of the opinion, all without having to reveal the reasons. [*infra,* App 33-36, Appendix "F"].

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JURISDICTION

Upon Petitioner's application, on March 11, 1997, the Honorable Sandra Day O'Connor graciously granted Petitioner an extension of time to file the instant petition to and including April 17, 1997 [*infra,* App 1, Appendix "A"]. The California Supreme Court filed its order denying appellant's petition for review of the appellate decision in question and denying the requests to officially publish (report) said opinion on December 18, 1996 [*infra,* App 2, Appendix "B"].

Jurisdiction of this Court is invoked under 28 U.S.C. §1257 which, in relevant part, reads:

> (a) Final judgments or decrees rendered by the highest court of a State in which decision could be had, may be reviewed by the Supreme Court by writ of certiorari... where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises substantial concerns over fundamental First Amendment rights of petition for a redress of grievances and of equal access to the courts which involve both the procedural and the substantial "due process" provision, and, also, the "equal protection" provision of the Fourteenth Amendment to the United States Constitution, and it presents a challenge to the constitutional strictures that prescribe the duty of adjudication and demand a "separation of powers" between the legislative and judicial branches of government.

The constitutional and statutory provisions involved are as follows:

U.S. CONSTITUTIONAL PROVISIONS

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition Government for redress of grievances.

Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS OF CALIFORNIA

The following statutory provisions of California are involved in this case:

Constitution of the State of California, Art. III, Sect. 1.

> The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land.

California Rules of Court for Publication of Appellate Opinions, rules 976-979.

California Rules of Court for the Publication of Appellate Opinions -- the *"California vacatur"* law -- forms the primary focus of this request for certiorari. As such, said rules, together with the enabling portions of the California Constitution, are set forth in their entirety in Appendix "F" at App 35-37. Please refer to said Appendix.

CALIFORNIA'S INTESTATE SUCCESSION PROVISIONS

The sections of the California Probate Code (former and current) which are the subject of the underlying dispute over succession rights to the decedent's estate, are as follows:

Former California Probate Code, Section 6408 -- (enacted) Stats. 1990 ch.79, (repealed) Stats. 1993 ch.529

> **§6408. Parent and Child relationship.** (a) A relationship of parent and child is established for the purpose of determining

intestate succession by, through, or from a person in the following circumstances:

(1) Except as provided in subdivisions (b), (c), and (d), the relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents.

(2) The relationship of parent and child exists between an adopted person and the person's adopting parent or parents.

(b) The relationship of parent and child does not exist between an adopted person and the person's natural parent unless both the following requirements are satisfied:

(1) The natural parent and the adopted person lived together at any time as parent and child, or the natural parent was married to or cohabiting with the other natural parent at the time the child was conceived and died before the birth of the child.

(2) The adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.

(c) Neither a natural parent nor a relative of a natural parent (except the issue of the child or a wholeblood brother or sister of the child or the issue of that brother or sister) inherits from or through the child on the basis of the relationship of parent and child if the child has been adopted by someone other than the spouse or surviving spouse of that parent. *{Enacted Stats. 1990 -- repealed Stats. 1993}*

Current California Probate Code -- Parent and Child Relationship (enacted) Stats. Sept. 1993 ch. 529; operative Jan. 1, 1994

§ 6450. Circumstances Under Which Relationship Exists for Intestate Succession. Subject to the provisions of this chapter, a relationship of parent and child exists for the purpose of determining intestate succession by, through, or from a person in the following circumstances:

(a) The relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents.

(b) The relationship of parent and child exists between an adopted person and the person's adopting parent or parents. *{Stats. 1993}*

Comment: *[of the California Law Revision Comm'n.] Section 6450 continues subdivision (a) of former 6408 without substantive change. The language "[s]ubject to the provisions of this chapter" is placed into the introductory clause because Sections 6451, 6452, and 6454 modify the relationship of parent and child between the adopted person and the person's adopting parent or parents, as well*

as the relationship of parent and child between a person and a person's natural parents. In the former 6408, application of the "except" clause was limited to the relationship of a parent and child between a person and the person's natural parents.

Section 6451. Adoption Severs Relationship; Exceptions.

(a) An adoption severs the relationship of parent and child between an adopted person and a natural parent of the adopted person unless both of the following requirements are satisfied:

(1) The natural parent and the adopted person lived together at any time as parent and child, or the natural parent was married to or cohabiting with the other natural parent at the time the person was conceived and died before the person's birth.

(2) The adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.

(b) Neither a natural parent nor a relative of a natural parent, except for a wholeblood brother or sister of the adopted person or the issue of that brother or sister, inherits from or through the adopted person on the basis of a parent and child relationship between the adopted person and the natural parent that satisfies the requirements of paragraphs (1) and (2) of subdivision (a), unless the adoption is by the spouse or surviving spouse of that parent.

(c) For the purpose of this section, a prior adoptive parent and child relationship is treated as a natural parent and child relationship.

***Comment** [of the California Law Revision Comm'n.]: Section 6451 continues the substance of subdivisions (b) and (c) of former Section 6408. . . . Subdivision (b) omits the reference to the adoptee's "issue" that was in the parenthetical "except clause in subdivision (c) of the former Section 6408. The former reference to "issue" was unnecessary. The issue of the adoptee do not inherit from or through the adoptee on the basis of a parent-child relationship between the adoptee and the adoptee's parents. Rather they inherit from or through the adoptee on the basis of the parent-child relationship between themselves and the adoptee.*

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HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

It is respectfully submitted that the *"California vacatur"* law as imposed against the petitioner's interest in this case has an effect which is repugnant to the Constitution of the United States.

The appended Opinion of the Court of Appeal recites the background facts of this case [*see,* App 4-8]. Insofar as they are pertinent to the issues raised here, they are briefly stated.

In 1991, Edna Clara Reedy, a widow, died without a will leaving an estate of approximately $950,000. She was survived by two siblings and about two dozen descendants of five siblings who had predeceased her (the "Mucklows"). In 1927, before she was married, Mrs. Reedy had given birth to her only child whom she gave up for adoption to strangers, Mr. and Mrs. Smith, shortly after birth. The natural father is unknown. At age 42, Norma Collene Maddox (the "adoptee"), with three children of her own, located Mrs. Reedy. The adoptee claimed to be the child whom Mrs. Reedy had relinquished for adoption as a baby. Mrs. Reedy never formally acknowledged the adoptee was as her "child." No parent-child relationship between the two was ever established in any court of law. The only birth record of the adoptee produced at trial, certified that she was born to Mr. and Mrs. Smith.

Three separate claims for inheritance are asserted. One claim is asserted by the Mucklows who succeed to the estate *if* Mrs. Reedy left no "issue." A second claim is asserted by a grandchild of Mrs. Reedy's pre-deceased husband ("Kirk") who is entitled to half of the former community-property home, *if* the decedent left no "issue." The third claim is asserted by the three children of the adoptee (the respondents), who, professing to be Mrs. Reedy's biological grandchildren, claim the entire estate as her lawful "issue." At trial, it was conceded that the adoptee herself could not succeed to the estate because the adoption had severed the parent-child relationship.

The controversy over the effect of adoption on succession rights has reached the California Supreme Court twice already. In *Reedy I* (which did not include Kirk), the court determined who administers the estate. *Reedy II* is to determine who inherits the estate. Though no supreme court review has been granted, in December, 1993, the court "*decertified*" the opinion in *Reedy I* (ordered unpublished what the appellate court had certified for publication); that is, the high court made "*disappear from the*

official reports" the opinion that had construed California's statutory law on adoption and succession rights to mean that "the children of an adopted child inherit from their natural grandmother." [see, App 8, 16]. In *Reedy II*, the appellate court (apparently relying on the "law of the case" rule and ignoring the inherent "separation of powers" conflict in applying it)[3] reasserted its earlier holding which was "*decertified.*" Again, the high court abstained from review, but it also declined, without comment, the requests, pursuant to California Rules of Court, rule 978, to publish said resurrected holding. [*See,* App 1 and App 35-37].

The seminal fact in this case is that on September 2, 1993,

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3. In the courts below, Petitioner had vehemently argued the Legislature, by Probate Code 3, [*see*, discussion thereof in Opinion at App 10-16] *expressly directed* that its 1993 enactment is to control the subsequent determinations of this probate, and that the doctrines of *res judicata* and *law of the case* cannot be applied to resolve the issues raised in *Reedy II,* because:

1. The trial judge specifically ruled that he was making a "new determination" and was not "taking refuge in any *res judicata* theory." So, there is no "law of the case' to apply to the "new determination."[*See*, ftn. 3, in Opinion at App 9].

2. Kirk was not a party to *Reedy I*. [*See*, "Facts" in Opinion at App 7]. So, there is no "law of the case" to apply to the determinations that involve Kirk's interests, and that doing so violates "due process" rights.

3. Probate Code §3 is the legislative pronouncement that "law of the case" is inapplicable here because the Legislature intended its own "clarifications" of ambiguous statutes to prevail over whatever interpretation a court may have given to the ambiguous statute in past adjudications. Given that, Petitioner argued, it was an "abuse of discretion" for the probate court to apply the *Reedy I* construction of former Probate Code §6408, unless it were determined that the Legislature did not intend the 1993 enactment to be a "clarification" of said former code section.

4. The settled law is that "law of the case" is a procedural rule and not an inescapable doctrine. Injustice, intervening law, change in circumstances (such as the appearance of Kirk on the scene which requires the court to make a new assessment, in any event), absurdity, all factors that are present here, justify revisiting the prior ruling. *(Note: Particularly, this point is extensively briefed; however, the Opinion gives no indication why the court rejects the contention.)*

one day after the Court of Appeal had issued its opinion in *Reedy I* on September 1, 1993, -- before the opinion became final -- the California Legislature repealed the intestate succession statute that *Reedy I* had interpreted [Probate Code §6408, *supra, p.6*] and enacted in its place "clarifying" legislation which showed, unequivocally, that the judicial construction that *Reedy I* had given the statute is not the meaning that the Legislature had in mind.[4]

In *Reedy II* the court was, therefore, presented with an unavoidable "separation of powers" conflict. It was asked to decide whose pronouncement of the state's intestate succession law prevails -- the appellate court's "decertified" September, 1993, *Reedy I* decision, which concluded that:

> If the parenthetical clause in section 6408, subdivision (c) is to be given any meaning at all, it must mean that children of an adopted child are able to inherit from their (biological) grandparents.

(which holding the appellate court reasserted in *Reedy II*, (*see,* App 17), or the Legislature's, September 1993, enunciation of the law, in Probate Code §6451, which explains, in its official comment thereto, that:

> Subdivision (b) omits the reference to the adoptee's "issue" that was in the parenthetical "except" clause in subdivision (c) of the former Section 6408. *The former reference to "issue" was unnecessary.* The issue of the adoptee do not inherit from or through the adoptee on the basis of a parent-child relationship between the adoptee and the adoptee's parents. Rather they inherit from or through the adoptee on the basis of the parent-child relationship between themselves and the adoptee. (emphasis added). *{Supra, p.7}*

Additionally, the comment to §6451 expressly refers to *Reedy I* saying, "this changes the rule of *in re Estate of Reedy*, 22 Cal. Rptr. 2d 478 (1993), *petition for hearing in California Supreme Court filed."* Moreover, the legislative history also makes reference to the fact that the new enactment is a "clarifying continuation" of

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4. Appellant did not discover what the Legislature had done until after *Reedy I* had been taken up, on a petition for review, to the California Supreme Court. Upon discovery thereof, in October of 1993, Appellant promptly notified the Supreme Court of the Legislature's enactment, and that court, on December 16, 1993, "decertified" the opinion in *Reedy I*.

the former law and not a substantive change of §6408 to make clear that the Legislature had not intended former §6408(c) to mean that children of an adopted child enjoyed greater rights to inherit than does the adopted child.

Though Appellant had vigorously argued that the conflict between the Legislature's and the Court's view of this statutory law needed to be addressed -- urging that the essential question to be answered in *Reedy II* is whether the new enactment had "created new law" or merely "clarified the existing law"[5] -- the Court of Appeal declined to consider whether the 1993 enactment was a legislative "clarification" of the former §6408. It offered the explanation that:

> Appellate counsel in the prior appeal was writing letters to the Law Revision Commission urging amendment of the law, and at the same time writing letters to the Supreme Court urging that court to consider the Law Revision Commission recommendations that were being submitted to the Legislature. The same attorney, who is also counsel for an appellant in this appeal, now urges this court to apply the recently-enacted law which probably resulted, in part, from the efforts to amend the law which arose in the earlier appeal. This court should not encourage or be a party to an effort to *manipulate the statutes* (emphasis added) in order to influence the outcome of a case." [*Opinion, at App 17, (before modification*].

While it is true that said explanation for not considering the "clarification" question was removed from the final opinion by a modification order (undoubtedly because the court was made aware that counsel had not "manipulated the statutes"), the court, however, did not modify its opinion on inherent "separation of powers" conflict created by its failure to address the "clarification

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5. Under well-settled California law, when an enactment is "clarification" of a statutory law, it is to be given retroactive application by the courts because such an enactment is a legislative expression of what the true meaning of the law had always been and is not a "new" law. [e.g., *Bowen vs. Board of Retirement* 42 C.3d 572, 575; *Bolen v. Peralta Junior College Distr.* (1974) 11 C.3rd 821, 828, fn. 8; *Arcadia Redevelopment Agency v. Ikemoto* (1993) 16 CA 4th 444; *accord, Negrette v. California State Lottery Com.* (1994) 21 CA 4th 1739, 1744].

versus new law" issue.

It concludes its opinion in *Reedy II* with expressly reiterating the deciding rule of law of *Reedy I* which the California Supreme Court had "*decertified*" in 1993, saying: [App 17]

> In our opinion in appeal No. E009967 *(Reedy I)* we held that under the law as written at that time "*the children of the adopted child are entitled to inherit from their biological grandmother.*" In this opinion we have concluded that the question of distribution of the estate should be decided under the law that existed in 1991, *that is, the law under which our earlier decision was rendered.* [emphasis added].

Although the appellate tribunal had originally (in its tentative opinion) indicated its intent to certify the *Reedy II* opinion for publication, the court changed its mind after hearing oral argument. The decision not to publish effectively immunized the opinion from review by the California Supreme Court since that court traditionally grants review *"only to secure uniformity of decision or to settle an important question of law."* [California Rules of Court, rule 29(a)]. With the 1993 recodification of the law, the question of what effect adoption has on succession rights [Probate Code §6451] was settled by the Legislature. If the *Reedy* opinion, which contradicts the legislation, were "unpublished," the uniformity of California law is not assailed, and there would be no need to review the aberrant opinion.

Of course, under California's "standards for publication of opinions," Rule of Court, 976(b) [App 33], the *Reedy* opinion is eminently publishable. That the opinion met those standards, on several grounds, was urged on the court, pursuant to California Rule of Court, 978 [App 36], by Attorneys, Bunt, Hekman and Senter [App 23-28]. And, recognizing that publication would greatly increase the chances of obtaining judicial review of the opinion, Respondents' counsel, Pinto and Savord "objected" to publication [App 29-34]. The appellate court declined to certify its opinion for publication and transmitted the matter to the Supreme Court for final determination, as mandated by rule, 978 [App 21].

In taking this unavoidable "separation of powers" conflict and

threatened violation of "equal protection of law" to the California Supreme Court, Petitioner reminded that high court that at stake is not only the distribution of Mrs. Reedy's million-dollar estate but also, the estates of countless numbers of decedents who died in the period of January 1985 to December 1993 when the questioned statute was in effect. Petitioner argued that, if the appellate construction of the repealed statute were correct -- that during those years the statute entitled the issue of adoptees to inherit from their natural grandparents -- then, under California probate law, *all* such potential heirs have a right to be notified of their possible heirship. If so, Petitioner argued, it would mean that the personal representative in all such probates must investigate whether the decedent ever had a child that was given up for adoption and will need to determine, and locate, any possible issue of such adoptees. Petitioner, moreover, reminded the high court that resolving the presented conflict by merely "not publishing" the decision would violate the "equal protection" right, referring, in a footnote, to the "objections" that Respondents had interposed to publication, saying:

> Respondents argue that their case is "special" because it presents unusual facts and suggest that, if the decision in the case remained unpublished, the impact of the law on other probates would be minimal. Respondents forget that "special" applications of the law violate the "equal protection" guarantee of the Constitution.

On December 18, 1996, the Supreme Court of California denied the petition for review (*Justice Baxter being of the opinion that review should have been granted) [App 1], thereby letting the appeal decision stand for the litigants, but also denied the requests for publication, thereby once again, abolishing all precedential value of that appeal decision and *obliterating* its effect on like-situated persons.

Petitioner respectfully submits that "dodging" the unavoidable "separation of power" conflict presented by this appeal through imposing a *"California vacatur"* on the rightful precedential effect of the opinion is repugnant to the United States Constitution.

___o___

REASONS FOR GRANTING CERTIORARI

Petitioner urges this Court to grant certiorari in order to settle the important question, and give guidance to the states and courts of this land, on the extent and limits to which courts have an obligation to decide a cause that is apparently within their jurisdiction and/or have discretion to eliminate their apparent jurisdiction, and/or have discretion to decline adjudication for reasons other than those grounded in constitutionally sound jurisdictional statutes.

Discussing the judicial obligation, Chief Justice Marshall in *Cohens v. Virginia,* 6 Wheat. (19 U.S.) 264 (1821) said: "*We have no more right to decline jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, exercise our best judgment, and conscientiously perform our duty.*"

Since those words were spoken, the business of courts has, of course, increased many fold. The rarified world of Justice Marshall no longer exists. Today's courts are all drastically overburdened. Of necessity, numerous prescriptions for curtailing jurisdiction have been fashioned. Rightfully so. Certainly, prudence and fairness should guide the court in molding its discretion to decline to exercise jurisdiction. However, "the power to deny decision" cannot be unlimited. The Constitution must be the bounds. This case presents a clear example where the bounds of the Constitution were repeatedly exceeded, on all levels of the judicial process, to avoid having to decide. Though the problem is endemic, a case like this reaches the Court rarely. The Court should take the opportunity to speak on an issue of such grave importance.

In exercising the discretion to decide or not to decide, (which is, of course, also a decision), the courts have traditionally been guided only by the mandate to "do what is fair." Is there more?

THE MANDATE TO "DO WHAT IS FAIR"

The "abstention doctrine" is the usual procedural tool that courts use to reduce the need to decide. Generally, under this doctrine, adjudication may be avoided whenever a decision not to decide is "fairly possible." The rule of *law of the case*, relied on by the appellate court below, is an example. Its standard limits are reason, fairness and prudence. [Petitioner respectfully submits, and has argued below, that this case presents a paradigm of that abstention device strained too far. The appellate court's decision not to decide whether the 1993 legislative enactment of California's intestate succession law was "new" law or a "clarification" of the law that existed when Mrs. Reedy died is grounded neither in reason, fairness, nor judicial prudence. In fact, its abstention from that necessary determination has pitted the court into an assured "separation of powers" conflict with the Legislature from which there can be escape only through further judicial review. That escape route to further judicial review was effectively blocked when the court decided not to certify its opinion for publication.

Though the California procedure of eliminating review jurisdiction by simply rendering the suspect decision *invisible* through directing its nonpublication is a practice that is not known in the federal system, the use of *vacatur* as a tool for managing judicial caseloads was recently reviewed by this Court in several cases. The decisions the Court reached in those cases underscore the constitutional infirmities in the "*California vacatur*"procedure.

Of course, the most effective way of eliminating the need to adjudicate a dispute is to have the parties enter into a voluntary settlement. For that reason, in all jurisdictions, settlements are greatly encouraged. Whether the *"vacatur"* power is available to federal courts to facilitate settlements was reviewed in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. ___ No. 93-714 (1994) where the Court held, in a unanimous opinion, that, absent exceptional circumstances, a settlement of the parties is not a proper ground to vacate a prior judgment in the case,

whether that judgment was rendered in the trial court or an appellate court.[6]

Remanding a cause presented for review to the court from whence it came for new decision, without reviewing the old, is a discretionary abstention technique that was newly embraced by this Court in *Lawrence v. Chater*,__ No.94-9323 (1996) and, *Stutson v. United States*,__ *No. 94-8988*. The extensive discussion on the extent and limits of the federal "GVR" -- the power to *grant* certiorari, *vacate* the judgment below, and *remand* for further decision -- in which this Court engaged in *Lawrence v. Chater*__ No.94-9323 (1996), is instructive. As said, it highlights the problems with the "*California vacatur*" and points to the fact that further exposition on the limits of the power to decline adjudication is needed. In its *per curiam* opinion, with a strong dissent from Justice Scalia, the Court explained that:

> In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration . . . *and alleviates the "[p]otential for unequal treatment"* that is inherent in our inability to grant plenary review of all pending cases raising similar issues. [cit. omitted]. We fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

The Court went on to caution that:

> all are agreed that our GVR power should be exercised sparingly. This Court should not just GVR a case because it finds the opinion, though arguably correct, incomplete and unworkmanlike.

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6. In contrast, California has legitimized the practice of stipulated reversal in *Neary v. Regents of University of California* (1992) 3 C.4th 273 and, moreover, has a strong presumption in favor of granting the parties' request for reversal.

From the Court's above referenced discussions of the *vacatur* power it is obvious that an essential ingredient of that power is the mandate to "do what is fair."

THE "CALIFORNIA VACATUR" IS INHERENTLY UNFAIR AND MARKS AN ABRIDGMENT OF THE FUNDAMENTAL RIGHTS OF PETITION, DUE PROCESS AND EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE CONSTITUTION

By "not publishing" or "depublishing" or "decertifying" a court of appeal opinion, without granting review, the California Supreme Court lets the decision stand with regard to the parties but eliminates its precedential value. The court has exercised this power with increasing frequency. Although the decertification of an opinion is not supposed to be a reflection of the court's opinion regarding the correctness of the decision or statements in the opinion [Cal. Rules of Ct., Rule 979(e) at App 37], its increasing use of decertification orders shows that it is being used as an expedient method of shaping the development of case law without adding to the court's burdened docket.

The Court's power to decertify court of appeal opinions is virtually unlimited. Cal. Const., art. VI, § 14, [App 38] provides simply that court of appeal opinions shall be published "as the Supreme Court deems appropriate," whereas Cal. Rules of Ct., Rule 976(c)(2), provides that "[a]n opinion certified for publication shall not be published ... on an order of the Supreme Court to that effect." Although a request for the decertification of any court of appeal decision must be made within 30 days after the decision becomes final with regard to the court of appeal [Cal. Rules of Ct., Rule 979(a), there is no comparable limitation on the Court's power to decertify an opinion on its own motion [Cal. Rules of Ct., Rules 979(d)]. As a result, the Supreme Court has frequently ordered the decertification of court of appeal opinions long after they have become final and have been published initially in the advance sheets of the official reports [*eg, Estate of Reedy(ReedyI)*

was published for over three months, at 18 CA 4th 769, before it was depublished; *People v. Marshall* (Sept. 5, 1989), published at 213 CA3d 1113, ordered decertified on June 26, 1990].

Moreover, though, the Cal. Const., art. VI, § 14,[at App 38] provides that: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated," it is the court's practice not to state reasons for its orders concerning publication or depublication of appellate opinions. The high court has, furthermore, declined all invitations (and there have been many) to speak on its *vacatur* practice. When, how, and why the "*California vacatur*" law is applied remains a locked secret.

What the Supreme Court meant by decertifying the *Reedy I* opinion was a hotly disputed, highly material, issue in *Reedy II* with direct relevance to the application of "law of the case" rule on which the *Reedy II* decision was, apparently, based. The question was expressly raised in the petition for review. The high court remained silent and gave no reasons for its decision not to direct publication of the Opinion in *Reedy II,* as was requested, three times, pursuant to Rule of Court, 978. [Appendices B, D, and E, App 2; 21-32].

The Opinion eminently qualified for publication, on several grounds, under the standards provided in Rule of Court 976(b) [App 33] for publication as urged by the three requests for publication. In fact, the Opinion required publication to ensure Fourteenth Amendment "equal protection" for those who would be, or might be, affected by the *law of Reedy* (that is, all children of adoptees whose natural grandparents died during the years when the *Reedy law* was in effect and all those interested in such estates). The decision not to publish the Opinion can only be explained as an effort to abolish the need for review and thereby to cut off Petitioner's access to the court.

Petitioner respectfully submits that such action impermissibly infringes his fundamental First Amendment right of petition for redress of grievances and of equal access to the court and due process guaranteed by the Fourteenth Amendment. *See, California Motor Transport Co. v. Trucking Unlimited,*404 U.S. 508, 510

(1972) ("The right of access to the courts is indeed but one aspect of the right to petition") *also see, Lewis v. Fletcher*__No. 92-1511 (1996), which reaffirms that the "fundamental right of access to the courts is well-established," which includes the right of equal access to appellate courts where the state chooses to provide appellate review.

THE REFUSAL TO ADJUDICATE THE "SEPARATION OF POWERS" CONFLICT IS AN UNCONSTITUTIONAL ABSTENTION OF JUDICIAL DUTY WHICH DEPRIVED PETITIONER OF HIS RIGHT TO EQUAL PROTECTION OF THE LAWS

There is not more basic, more momentous, a duty that falls upon the highest court of any state (or the land) than the duty to decide a conflict that pits the realm of the courts against the realm of the Legislature. In our American form of constitutional government, based as it is on the concepts of equality before the law, inviolate individual rights and freedoms, and the separation of powers between the three co-equal branches of government, the decision to abstain from deciding a cause presented for decision has grave consequences. If the only branch of government whose affirmative duty it is to adjudicate questions dealing with conflicts of power between the branches declines to rule, our constitutional form of government cannot function.

Though deciding not to decide is certainly the rule of supreme court review, it is respectfully submitted that the California Supreme Court (or any court of last resort) possesses no discretion to abstain from adjudicating a presented conflict when, as here, an appellate opinion has established a previously unrecognized rule of law in an area that belongs exclusively to the Legislature (such as the purely statutory realm of determining the rules of intestate succession), and the Legislature has made its intent on the matter known and has expressly disavowed the contradictory court-created rule. Such a case presents a direct and unavoidable conflict between the domain of the Courts and the domain of the

Legislature, and in such cases, the highest court is always the interested principal. The inherent conflict raises the constitutional duty to mediate conflicts between the judiciary and the Legislature to the highest level. Thus when presented with a request to adjudicate a "separation of power" issue between the judicial and legislative branches of the government, the high court is obligated to exercise its jurisdiction and review the matter with the utmost good faith toward the Legislature.

If suspect appellate decisions are not faithfully scrutinized for violations of the judicial power to interpret the laws, and not make them, the supreme court empowers its judicial subordinate with the means to overthrow the power of the legislature to make the laws. All legal fiction (that denial of review is not a determination of the correctness of an appellate opinion) aside, when the California Supreme Court declines review, it has, in fact, made the decision to allow the rule of law pronounced in the opinion (right or wrong) to control the rights of, at least, the parties to the case. So, when the high court remains silent by declining to review an errant appellate decision, it clothes itself with the judicial authority of its subordinate.

The "nonpublication" power gives the California Supreme court a second, very potent, discretionary tool with which it can limit the reach of the decisions that subordinate appellate courts make. By refusing to publish an opinion, or by ordering it depublished, the effect of the decision is limited to the parties to the decision. Obviously, opinions that determine cases based on already established rules of law need not be published because the rule already exists. But, when an opinion establishes a previously unrecognized rule, or alters or modifies an existing rule, such opinion should be (and historically is required to be) published so that all others can be guided by it, and the newly created rule is not a "judicial secret."

If the Supreme Court decides not to publish, and/or to depublish an appellate opinion that conflicts with a published legislative pronouncement on the same subject, the legislative rule remains the operative one for all except those who are party to the

case for which a different rule of law was adjudicated. Unless there is a sufficient "rational reason" for not reviewing the case and for not publishing the opinion, the selective "unequal" application of a law through discretionary nonreview and discretionary nonpublication is clearly unconstitutional.

Petitioner respectfully submits that there is no sufficient "rational reason" for the "*California vacatur*" law. In its present form and in its application to this Petitioner it is repugnant to the Constitution of the United States.

—o—

28 U.S.C. sect. 2403 (b) may be applicable

CONCLUSION

WHEREFORE, for these various reasons, Petitioner prays that this Honorable Court grant this Petition and issue its Writ of Certiorari.

April 17, 1997

Respectfully submitted,

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Counsel of Record
for Petitioner
Lawrence B. Mucklow

APPENDIX "A"
EXTENSION OF TIME TO FILE WRIT

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

March 11, 1997

Ms. Erika W. Senter
4199 Campus Drive
Suite 700
Irvine, CA 92715

Re: Lawrence B. Mucklow
v. Sherry E. Farrow Harvey, et al.
Application No. A-651

Dear Ms. Senter:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on March 11, 1997, extended the time to and including April 17, 1997.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, CLERK
By Loretta S. Ruffin
Assistant Clerk

[Notification List-omitted]

APPENDIX "B"
SUPREME COURT OF CALIFORNIA ORDER

Fourth Appellate District, Division Two, No E 014711
S056527
IN THE SUPREME COURT OF CALIFORNIA

Estate of Edna Clara Reedy
SHERRY E. FARROW HARVEY, et al.
Respondents,

vs.

LAWRENCE B. MUCKLOW, et al.,
Appellants.

SUPREME COURT
FILED
Dec 18, 1996

Robert Wendruff, Clerk

Deputy

Petition for review DENIED.
The requests for an order directing publication of the opinion are denied.

Baxter, J. is of the opinion the petition should be granted.

R. M. GEORGE

Chief Justice

APPENDIX "C"
CALIFORNIA COURT OF APPEAL OPINION

FILED
SEP 10, 1996

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

Estate of EDNA CLARA REEDY,
Deceased.

SHERRY E. FARROW HARVEY, et al.,
Petitioners and Respondents,

v.

E 014711
(Super.Ct.No.P61523)

LAWRENCE B. MUCKLOW et al.,
Objectors and Appellants.

OPINION

APPEAL from the Superior Court of Riverside County. William H. Sullivan, Judge. Affirmed.

Erika W. Senter, Ralph Hekman and Norbert Bunt for Objectors and Appellants.

George Hugh Savord and Richard J. Pinto for Petitioners and Respondents.

We are asked to decide whether the probate court erred when it applied the law in effect at the time of decedent's death to determine who was entitled to distribution of decedent's estate. Appellants challenge a probate order, issued in 1994, holding that under the law in effect at the time of decedent's death in January

1991 respondents were entitled to distribution of decedent's entire estate. Respondents are the children of decedent's natural daughter who had been given up for adoption by decedent as an infant. We affirm.

FACTS

In 1927 Edna Clara Mucklow, who was 20 years old and not married, became pregnant. She was sent from her native Nebraska to California to stay with her brother until the child was born. Following the birth of her daughter, whom she named Norma Collene, she gave the child up for adoption. Edna Clara Mucklow subsequently married Mr. Reedy. They had no children, although Mr. Reedy had one son from a previous marriage. Mr. Reedy died in 1985. Edna Clara Reedy died in 1991 leaving an estate of about $950,000.

Norma Collene was raised by a loving adoptive family, the Smiths. She married Mr. Farrow and had three children, Sherry E. Farrow Harvey, Thomas O. Farrow and James E. Farrow, who are respondents in this proceeding. Norma Collene divorced Mr. Farrow and married Mr. Maddox; in these proceedings she is generally referred to as Norma Collene Maddox or just Collene Maddox. Norma Collene Maddox died in 1993, while these proceedings were pending.

In the early 1970's, when she was in her 40's, Norma Collene Maddox needed a passport and asked her adoptive mother for her birth certificate. She was shown her adoption papers, which contained the name Mucklow, and through that unusual name she located her birth mother, Edna Clara Reedy. Norma Collene Maddox and Mrs. Reedy were pleased to find each other and continued to see each other at least several times a year, and during some periods every week, until Edna Clara Reedy's death in 1991.

Mrs. Reedy left no will. Following her death, a petition for letters of administration was filed by Karyn Story, who claimed to be a niece of Mrs. Reedy and to have been nominated by Mrs. Reedy's brother. In her petition, Story listed the heirs of Mrs. Reedy, comprising two surviving siblings and about two dozen

descendants of five siblings who had predeceased Mrs. Reedy.

The following month a petition was filed by Sherry E. Farrow Harvey (Harvey) on behalf of herself and her two brothers, claiming that she was entitled to letters of administration as the representative of the only grandchildren of Mrs. Reedy. Her petition included a nomination by Norma Collene Maddox.

Harvey based her claim on Probate Code section 6408.5 subdivision (b), which at the time of Mrs. Reedy's death in January 1991 stated, "Neither a parent nor a relative of a parent (except for the issue of the child or a wholeblood brother or sister of the child or the issue of such brother or sister) inherits from or through a child on the basis of the relationship of parent and child if the child has been adopted by someone other than the spouse or surviving spouse of that parent." (Stats 1985, ch. 982,§22, p.3119.)

The trial court concluded that the parenthetical clause "except for the issue of the child" carved out an exception to the general rule that the relative of a parent of a child who has been adopted out cannot inherit from or through the adopted child. Accordingly, the trial court concluded that "Sherry E. Farrow Harvey, as the granddaughter of decedent and within the exception set out in Probate Code § 6408.5(c) is entitled to letters of administration."[1] On appeal from that order this court reviewed the statutes and the case law surrounding the question and affirmed the trial court's

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1. The trial court cited Probate Code section 6408.5, subdivision (c), which addresses the question of who should inherit from the child born out of wedlock. In *Estate of Reedy* (Oct. 1, 1993) E009967 [nonpublished opinion] (hereinafter, appeal No. E009967), this court construed Probate Code section 6408.5, subdivision (b), the text we quote here, which addresses the question of who should inherit from or through a child who has been adopted. By the time the court's opinion in appeal No. E009967 was issued that latter code section had been renumbered section 6408, subdivision (c).

The clauses contained in both sections and construed by both the trial court and this court in appeal No. E009967 --"(except for the issue of the child . . .)" -- are identical. In this opinion we will cite the code sections that existed at the time of Mrs. Reedy's death in January 1991.

decision. Appellant's petition for review by the California Supreme Court was denied, but the Supreme Court ordered that the opinion not be officially published.

The petition for review was denied December 1993 and remittitur in the case was issued by this court December 22, 1993. In January 1994 appellants filed a motion in this court to recall the remittitur in light of legislative changes to the Probate Code effective January 1, 1994. This court denied the motion and no further action was taken in that appeal.

In November 1991, while the appointment of Harvey as administrator was on appeal, Harvey and her two brothers (who will be referred to collectively as the Farrows) petitioned the probate court asking the court to determine who was entitled to distribution of the estate. They argued that they were entitled to inherit under the statute as it had been interpreted by the trial court in the earlier proceeding. They contended that under the exception contained in the parenthetical clause of Probate Code section 6408.5, subdivision (c), respondents were able to inherit through their mother even though she had been born out of wedlock. The Farrows quoted the Law Revision Commission comments to the 1985 amendments to Probate Code sections 6408 and 6408.5, which stated that: "In addition, subdivision (c) is amended to permit the issue of the child or a brother or a sister of the child...to inherit from or through the child even though the requirements of paragraphs (1) and (2) of subdivision (c) [relating to acknowledgment and support of a child born out of wedlock by the natural parent] are not satisfied." (18 Cal. Law Revision Com. Rep. (1986) p. 303) The Farrows argued that they exactly fit the legislative exception carved out in Probate Code section 6408.5, subdivision (c), and that "The three grandchildren are exempted from the general rule of non-inheritance by statutory exception, and thus should be found to be the sole heirs of the decedent."

Lawrence Mucklow, Mrs. Reedy's brother, subsequently filed with the court a statement of interest asking the court to divide the estate into seven shares to be distributed to the two surviving siblings of Mrs. Reedy and to the issue of the five predeceased

siblings of Mrs. Reedy.

In December 1991 Vivienne Lynn Kirk filed a statement of interest in the estate alleging that she was the granddaughter and only living descendant of Mr. Reedy, Mrs. Reedy's husband who died in 1985, and that under Probate Code section 6402.5, subdivision (f), she was entitled to one-half of the community real property held by Mr. and Mrs. Reedy at the time of Mr. Reedy's death.[2] Under that section, heirs of a predeceased spouse are entitled to claim an intestate share of the community property only if there is no surviving spouse or issue of the decedent; thus, although the Mucklows and Kirk had competing interests, both were asking the court to determine that the children of Norma Collene Maddox were not the issue of Mrs. Reedy for purposes of distribution of her estate.

The proceedings to determine who was entitled to distribution of the estate were apparently stayed pending resolution of the appeal of the order to issue letters of administration to Harvey. Following denial of review by the Supreme Court in appeal No. EOO9967, counsel for Lawrence Mucklow filed an amended trial brief stating that "The basic dispute between the parties concerns the question of what law is applicable" to the determination of who, among the three sides to the probate, inherits the estate.

Mucklow went on to note that on September 27, 1993, less than four weeks after the filing of this court's opinion in appeal No. EOO9967, the Legislature had repealed the code sections construed in that opinion and had replaced them with Probate Code section 6451, which took effect January 1, 1994. Under the amended section the clause referring to issue of an adopted child, which was of critical importance to this court's earlier opinion, had been deleted.

Following extensive briefing and a hearing held in April 1994 on the Farrows' petition to determine who was entitled to distribution, the probate court took the matter under submission.

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2. In the petition for letters of administration filed by Harvey the real property was estimated to have a value of $300,000.

A formal order was duly entered holding that: "1. Sherry E. Farrow Harvey, Thomas O. Farrow and James Farrow are issue of Edna Clara Reedy, so that Probate Code Section 6402.5[3] does not apply, and are entitled to distribution, equally, of the entire estate of Edna Clara Reedy, under Probate Code Section 6408 in effect on her date of death, because that estate vested in them on the date of death, subject only to administration.

"2. Norma Colleen [sic] Maddox was born out of wedlock to Edna Clara Reedy, and was, after her adoption out, acknowledged by Edna Clara Reedy, as her child; and Edna Clara Reedy, after said adoption, contributed to the support and care of Norma Colleen [sic] Maddox, so that Sherry E. Farrow Harvey, Thomas O. Farrow and James Farrow as relatives of Edna Clara Reedy, to-wit: grandchildren, would be entitled to inherit her estate through their mother, Norma Colleen [sic] Maddox, if Probate Code Section 6452 were to be followed."

Mucklow and Kirk each have filed an appeal from the order of the probate court determining the persons to whom distribution should be made.

DISCUSSION

On appeal[4] Mucklow repeats the contentions he presented in

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3. As we have discussed above, Probate Code section 6402.5 concerns the rights of the heirs of a predeceased spouse to a share of the community property. As we have also noted, that section applies only if there is no surviving spouse or issue of the decedent.

4. On July 13, 1995, this court reserved ruling on a request by Mucklow to take judicial notice of certain documents relating to the Law Revision Commission tentative recommendations for amendment to Probate Code 6452, distributed by the commission for comment in March 1995. Included in the materials was a letter from appellate counsel for Mucklow to the staff counsel of the Law Revision Commission, written in December 1993, setting out, among other things, counsel's view of what was wrong with this court's

(continued...)

the trial court, again clearly stating his arguments that (1) the Farrows were not "heirs" of Mrs. Reedy under code language "that is in effect now"; (2) the former language of the code was not the language to be applied to the determination before the court now; (3) the previous order granting letters of administration to Harvey did not determine the right to inherit; (4) the doctrines of law of the case and collateral estoppel "do not apply and do not foreclose reexamination of the Farrow's right to inherit within the meaning of Probate Code section 6451 [as amended effective January 1, 1994]"; and (5) the Farrows cannot take the estate as "issue" of Mrs. Reedy within the meaning of Probate Code sections 50, 6402, or 6402.5, and no other code section makes provision for such "special" claims. Kirk joins in the arguments made by Mucklow, and she too argues that the Farrows failed to establish that they were "issue" of Mrs. Reedy.[5]

(...continued)

decision in appeal No. EOO9967.

In light of the fact that we are not basing our decision on Probate Code section 6452 as it was written after January 1, 1994, we do not believe that the materials presented in the request for judicial notice are relevant to this appeal. We therefore deny Mucklow's motion for judicial notice of those documents.

5. Appellants also contend that respondents have failed to establish that Norma Collene Maddox was in fact the child given up for adoption by Edna Clara Reedy in 1928.

If Norma Collene Maddox was not the natural child of Edna Clara Reedy, Sherry E. Farrow Harvey would have had no greater claim to letters of administration than Karyn Story. (See Prob. Code, § 8461, listing priority for appointment as administrator.) The court's ruling in the earlier proceedings depended on the factual determination that Harvey and her brothers were the grandchildren of decedent, and that Norma Collene Maddox was the natural daughter of Mrs. Reedy. That finding was not challenged in the previous appeal. In the interest of bringing finality to these proceedings we are inclined to deem that issue to have been conclusively resolved in the earlier proceeding.

Appellants emphasize, however, that the trial court chose not to "take refuge in a res judicata theory" on the issue of whether Norma Collene Maddox was the child given up by Edna Clara Reedy, and that instead the court agreed

(continued...)

One issue appears to us to be dispositive of the case before us: What law should be applied to the determination of heirship? We agree with the trial court that the applicable law is the law in effect at the time of Mrs. Reedy's death in January 1991. We therefore affirm the trial court's order.[6]

At the time of the trial court's decision in 1994, Probate Code section 3, subdivision (b), provided, with regard to the application of new or amended code sections, that "This section governs the application of the new law except to the extent otherwise expressly provided in the new law." (Stats 1989, ch. 21, § 1, p. 72.)

Probate Code section 3 went on to state, in subdivision (c): "Subject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, creation of a fiduciary relationship, death of a person,

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(...continued)

to review the evidence submitted by the parties. The court then held that "Norma Colleen [sic] Maddox was born out of wedlock to Edna Clara Reedy, and was, after her adoption out, acknowledged by Edna Clara Reedy, as her child." We find that the trial court's determination on this issue was supported by substantial evidence in the record and we affirm.

6. We recognize that in the order denying the motion to recall the remittitur in appeal No. EOO9967, filed February 2, 1994, this court included the statement: "We decline to give the parties an advisory opinion on the other issues they raise, except to note that the trial court should decide those issues under the law in effect at the time of its decision, and we will consider the correctness of the trial court's decision in any future appeal."

At the hearing on the motion to determine heirship the trial court indicated that it viewed this court's statement in the earlier order as dicta, and that it did not view itself as bound by the statement. We are of the same opinion. At the time of the order denying the motion to recall the remittitur, the issue of which law should apply to determinations of heirship was not before this court.

Another possibility is that this court meant no more than that the trial court should apply the law that applies. Under that interpretation, the trial court determined that the "law in effect at the time of its decision" was the law in effect at the time of Mrs. Reedy's death in January 1991.

commencement of a proceeding, making of an order, or taking of an action." (Stats 1989, ch. 21, § 1, p. 72.)

Probate Code section 3, subdivisions (g) and (h) stated: "(g) If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its repeal or amendment by the new law.

"(h) If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date, the court may, notwithstanding this section or the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference." (Stats 1989, ch. 21, § 1, p. 73.)

The probate court was unequivocal in deciding what law should apply to the determination of heirship, holding that the Farrows were "issue" of Mrs. Reedy and should take "under Probate Code Section 6408 in effect on her date of death, because that estate vested in them on the date of death, subject only to administration."

Under subdivision (h) of section 3 of the Probate Code the probate court is given the discretion to apply pre-existing law "to the extent reasonably necessary" to mitigate the "substantial interference" of the new law with "the rights of the parties or other interested persons in connection with an event that occurred...before the operative date" of the new law. Our review of the probate court actions under this section would be to determine whether the court abused its discretion. (Stats 1989, ch. 21, § 1, p. 73.) '''The test is not whether we would have made a different decision had the matter been submitted to us in the first instance. Rather, the discretion is that of the trial court, and we will only interfere with its ruling if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge reasonably could have reached the challenged

result.' (*Estate of Billings* (1991) 228 Cal. App.3d 426, 430....)" (*Estate of Hammer* (1993) 19 Cal. App.4th 1621, 1634.)

It cannot be doubted that the new law interfered substantially with the rights of the beneficiaries in the present case. Under the law applicable at the time of Mrs. Reedy's death--as that law was interpreted by the probate court in the earlier proceeding, affirmed by this court, and not disapproved by the Supreme Court--the Probate Code contained an exception that permitted the issue of a child who had been adopted out to inherit from the natural parents of the adoptee. Under that law the Farrows stood to inherit Mrs. Reedy's entire estate. There also does not appear to be any question that under Probate Code section 6451, in effect at the time of the 1994 probate court order determining who was entitled to distribution, the Farrows would not have been able to inherit from Mrs. Reedy. The clause relating to "issue of the [adopted] child" had been eliminated from the exception construed by this court in the earlier appeal. Application of the new law would have completely divested the Farrows of their interest in the considerable estate of Mrs. Reedy. It is clear that such a result would constitute "substantial interference" with the rights of the parties to these proceedings, and the trial court's decision to apply the old law was an appropriate exercise of the court's discretion.

In making its ruling, however, the trial court did not simply exercise its discretion under section 3 of the Probate Code. It held instead that the "estate vested in [the Farrows] on the date of [Mrs. Reedy's] death, subject only to administration." At the time of the hearing on the motion the court made its views plain: "I don't want to preempt Counsel in any way, but it seems to me that the basic question to be argued at this point is whether the law of succession in effect at the date of Ms. Reedy's death is the one that governs entitlement to distribution or...whether some change in the law that was made after that time governs distribution. And frankly, I have to be sold on the proposition that [it is] some change in the law after the date of death that governs, because my upbringing and experience as well as the cases cited after 6400 of the Probate Code seem to me to be fairly conclusive that the rights of heirs

vest as of the date of death of the ancestor. But I'll be glad to hear your try to persuade me to the contrary...."

The traditional law in California has been as stated by the trial court. "Under our law of succession the title to the estate of a person dying intestate vests in the heirs, whether known or unknown, immediately upon his death. [Citations.]" (*State v. Miller* (1906) 149 Cal. 208,210; accord, *Estate of Wellings* (1925) 197 Cal. 189, 194.)

Probate Code section 300, codified in 1931, stated, in relevant part: "When a person dies, the title to his property, real and personal, passed to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate" under the rules of intestate succession." (Stats 1931, ch. 281, § 300, p. 599.)

Probate Code section 300 did not effect any change in the traditional rule: "The decedent died intestate, and upon his death title to the property became vested in his heirs (Prob. Code, sec. 300) whether such heirs were known or unknown...." (*Johns v. Scobie* (1939) 12 Cal.2d 618, 623 [citing *State v. Miller*, supra, 149 Cal. 208].) "Under Probate Code section 300, whatever property passes to a testator's heirs by reason of intestacy vests as of the date of the testator's death. [Citations.]" (*Estate of Roulac* (1977) 68 Cal. App.3d 1026, 1032, fn. omitted.) "Under the law of intestate succession, title vests in an heir immediately on death and no assent or acceptance is required to fix title in the heirs. [Citation.]" (*Estate of Taylor* (1973) 33 Cal. App.3d 44, 49.)

The courts also addressed the effect of a change in the law on the vesting of such an interest: "It is, of course, settled that when a decedent dies intestate, his heirs, both known and unknown, acquire an interest in his estate by operation of law at the moment of death, which interest cannot be divested by subsequent changes in the law of succession. (*Johns v. Scobie* (1939) 12 Cal.2d 618, 623...;*Estate of Wellings* (1925) 197 Cal. 189, 194....)" (*Mannheim v. Superior Court* (1970) 3 Cal.3d 678.691.)

Former Probate Code section 300 was repealed effective July 1, 1989; however, the substance of the provision was reenacted in

Probate Code section 7000, where it remains. At the time of the hearing in 1994, section 7000 stated, in relevant part, that subject to administration, "title to a decedent's property passes on the decedent's death...to the decedent's heirs as prescribed in the laws governing intestate succession."

Appellants ask us to interpret the language of Probate Code section 3, quoted above, to mean that the Legislature intended that some law other than the law in effect at the time of Mrs. Reedy's death should be applied to distribution of her estate. They ask us to apply Probate Code section 6451, which took effect January 1, 1994, retroactively to govern the distribution of the estate, notwithstanding the fact that under Probate Code section 7000 the interests in the estate vested at the time of Mrs. Reedy's death in January 1991.

"It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." (*Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, p. 393.) "In spite of the fact that the two points are frequently confused into one, the question of the constitutionality of retroactive legislation and the question of the intention of the Legislature to make a statute retroactive are distinct questions. The latter question is not a federal one, but one of interpretation of a state statute...." (*Ware v. Heller* (1944) 63 Cal. App.2d 817, 821.)

Thus, the question before us is whether the Legislature intended that the provisions of section 3 of the Probate Code, directing application of the new law, should be held to prevail over Probate Code section 7000, regarding vesting of title upon the decedent's death. If we decide that the Legislature did intend that the new law should be applied, then we will have to consider whether application of the new law in these circumstances is constitutional.

There is a "well-established presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1218.) In the present case, the intent of the Legislature as expressed in the

language of Probate Code section 3, is not unequivocal. Subdivision (c) of that section contains the Delphic statement that "the new law applies on the operative date to all matters governed by the new law." The fact that the trial court is given the discretion by Probate Code section 3, subdivision (h), to apply the former law indicates that the Legislature was approaching the issue of retroactivity with some caution. Moreover, the Legislature has given the court discretion to take into account, in deciding which law to apply, whether the new law would substantially interfere with the rights of the parties. We interpret this as indication of an intent on the part of the Legislature to respect the rights that were vested under the old law.

Nor does the language of other code sections strengthen the position of appellants. Probate Code section 6414, subdivision (a), provides that this "part" of the code (i.e., part 2 of division 6 of the Probate Code, dealing with intestate succession) is to apply only where decedent died on or after January 1, 1985. By legislation enacted in 1983, major revisions were made to the Probate Code, to take effect January 1, 1985. Probate Code section 6414 was added in 1984, effective January 1, 1985, making it clear that the revised code sections were not to apply to the estates of decedents who died before the effective date of the revisions. Thus, the Legislature at that time expressed a particular intent not to give retroactive effect to the new provisions governing intestate succession.

There is no such provision, however, regarding retrospective application of the 1991 and 1993 code amendments. The absence of such a provision could indicate an intent that the subsequent amendments should govern all cases involving decedents who die after January 1, 1985, even in those cases in which the decedent dies before the amendments take effect. Equally plausible, however, is the conclusion that the legislators were familiar with the provisions of Probate Code section 7000 regarding the vesting of interests, and, having stated the general rule regarding retroactive application of the intestate succession laws, they trusted the discretion and judgment of the probate court judges to apply

the new law only when it did not conflict with the traditional rule.

We conclude that if the Legislature intended to change a rule as well established as the rule at issue in this case then it had an obligation to state its intent clearly and unequivocally and to address and amend the code sections, such as Probate Code section 7000, which would be vitiated by the change. Our review convinces us that the Legislature has not expressed a clear intent that courts should apply law other than the law in effect at the time of decedent's death to the question of who is entitled to inherit the estate of one who dies without a will. Thus we do not reach the question of whether a retrospective law would have been constitutional.

Appellants appear to approach this case under two theories: (1) either the amendments effective in 1994 did not change the law but merely clarified it, in which case the earlier ruling of this court was wrong and should now be corrected by an order distributing the estate to the parties who were always entitled to receive it; or (2) the amendments effective in 1994 are a change in the law but they demonstrate that the Legislature had never intended to do what this court found it had done in enacting the earlier law, so the amendments reflect the true intent of the Legislature and therefore should be applied. Neither argument can prevail.

The earlier ruling of the probate court may have been incorrect, but neither this court nor the Supreme Court thought so. No matter what the Legislature may have thought it was doing in enacting those sections, the final interpretation of their effect is left to the courts. Thus, appellants' first argument must fail; even if our first opinion was "wrong," it was binding as to the matters decided. Evidence that the Legislature had intended something else is, at this point, irrelevant.

Appellants' second argument is equally unavailing. They argue that the change in the language of the statutes demonstrated an intent on the part of the Legislature to change the outcome in the earlier appeal, but only to conform to the intent that always existed. They argue that now that the Legislature has made its intent clear, this court should rely on the later enactment to

interpret the true meaning of the old law and should apply the new enactment.

We have discussed above our reasons for declining to apply the new law. This case, too, provides a clear example of the protections afforded by limitations on the retroactive application of new law. Appellate counsel in the prior appeal was writing letters to the Law Revision Commission urging amendment of the law, and at the same time writing letters to the Supreme Court urging that court to consider the Law Revision Commission recommendations that were being submitted to the Legislature. The same attorney, who is also counsel for an appellant in this appeal, now urges this court to apply the recently-enacted law which probably resulted, in part, from the efforts to amend the law which arose in the earlier appeal. This court should not encourage or be party to an effort to manipulate the statutes in order to influence the outcome of a case.

The last argument made by appellants is that the Farrows have failed to establish that they are "issue" of Mrs. Reedy as that term is defined in the Probate Code. They contend that the Probate Code thus contains no provision for distribution of the estate to them since Probate Code section 6402, which governs intestate distribution of the estate, relies on established lines of succession.

In our opinion in appeal No. EOO9967 we held that under the law as written at that time "the children of the adopted child are entitled to inherit from their biological grandmother." In this opinion we have concluded that the question of distribution of the estate should be decided under the law that existed in 1991, that is, the law under which our earlier decision was rendered. That being so, our earlier decision that the Farrows could inherit from Mrs. Reedy is law of the case and is not now open to further review. Moreover, in the present case the probate court made the specific finding that "Sherry E. Farrow Harvey, Thomas O. Farrow and James Farrow are issue of Edna Clara Reedy." That finding is sufficient to overcome any inconsistency raised by the contention that Norma Collene Maddox was no longer the "issue" of Mrs. Reedy following the adoption so her children could not be the

"issue" of Mrs. Reedy. We conclude there is no merit to appellants' contention on this issue.

The fact that the Mucklows were not nominally part of the earlier appeal does not mean that they are not bound by this court's prior ruling in the same proceeding on an issue of law. The interests of the Mucklows were represented by Karyn Story in the earlier appeal, and the question of whether the Farrows could inherit from their biological grandmother was fully and vigorously litigated.[7]

DISPOSITION

The order determining that respondents are entitled to distribution of Mrs. Reedy's estate is affirmed. Costs on appeal to be borne by appellants.

NOT FOR PUBLICATION

RAMIREZ
P.J.

We concur:

WARD
J.

McDANIEL
J.*

---

7. As we have stated, appellate counsel for Story in the previous appeal is now representing the Mucklows in this appeal.

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

FILED
OCT 03, 1996

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

Estate of EDNA CLARA REEDY,
Deceased.

SHERRY E. FARROW HARVEY, et al.,
Petitioners and Respondents,

v.

LAWRENCE B. MUCKLOW et al.,
Objectors and Appellants.

E 014711
(Super.Ct.No.P61523)

MODIFICATION OF OPINION AND ORDER DENYING PETITION FOR REHEARING

The opinion filed in this case on September 10, 1996, is modified as follows:

The second full paragraph of page 18 {*here, the first full paragraph of page App 17*} is stricken in its entirety and replaced with the following:

"We have discussed above our reasons for declining to apply the law enacted in 1994 to distribution of the estate of a decedent who died in 1991, and we need not restate them here."

Except for the modification of language hereinabove set forth,

the opinion previously filed remains unchanged. The modification does not effect a change in the judgment.

The petition for rehearing is DENIED.

NOT FOR PUBLICATION

RAMIREZ
P.J.

We concur:

WARD
J.

McDANIEL
J.*

*Retired Associate Justice of the Court of Appeal sitting under assignment by the chairperson of the Judicial Council

APPENDIX "D"
APPEAL COURT'S TRANSMITTAL LETTER PURSUANT TO CALIFORNIA RULES OF COURT, RULE 978(a) UPON DECLINING THE REQUESTS FOR PUBLICATION

[seal]

Court of Appeal

FOURTH APPELLATE DISTRICT, DIVISION TWO
303 WEST FIFTH STREET
SAN BERNARDINO, CALIFORNIA 92401

CHAMBERS OF
MANUEL A. RAMIREZ
PRESIDING JUSTICE

909-383-4443

October 3, 1996

The Honorable Ronald M. George
Chief Justice
California Supreme Court
303 Second St., South Tower
San Francisco, California 94107-1117

Re: Estate of Edna Clara Reedy, deceased
No. E014711, Superior Court No. P-61523

Dear Chief Justice George:

Pursuant to California Rules of Court, rule 978a, there is transmitted herewith a copy of our opinion in the above matter, together with all requests for its publication and all objections thereto.

[*continued on next page*]

It is not published because, in our view, the opinion does nothing but restate settled legal principles.

Respectfully yours,

[signed]
Manuel A. Ramirez
Presiding Justice

MAR:mm
enclosures
cc: Erika w. Senter, Esq., 4199 Campus Dr., Ste. 700, Irvine, CA 92715
Norbert Bunt, Esq., 601 No. Parkcenter Dr., Ste. 103, Santa Ana, Ca 92705
George Hugh Savord, Esq., 41530 Enterprise Cir. So., Ste. 207, Temecula, CA 92390
Richard J. Pinto, Esq., 103 Avenida Del Mar, 2nd Fl., San Clemente, Ca 92672
Ralph K. Hekman, Esq., 4046 Chestnut St., Riverside, CA 92501

APPENDIX "E"
PUBLICATION REQUESTS AND OBJECTIONS THERETO PURSUANT TO RULE 978 OF THE CALIFORNIA RULES OF COURT

[Bunt Letter - requesting publication]

LAW OFFICES OF
NORBERT R. BUNT
PROFESSIONAL CORPORATION
601 NORTH PARKCENTER DRIVE, SUITE 103
SANTA ANA, CALIFORNIA 92705
(714) 558-8823

September 20, 1996

To the Honorable Justices of the
Court of Appeal For the State of California
Fourth Appellate District, Division Two
303 W. Fifth Street
San Bernardino, CA 92401

Re: Estate of Reedy - Case No. E0124711
Request for Publication re California Rule of Court 978(a)

Your Honors:

In reference to this Court's Opinion rendered in the above-entitled matter, it is respectfully requested that said Opinion be certified for official publication. This request is based in part upon the following factors:

1. The Court's Opinion establishes a new rule of law for all intestate estates of decedent's[*sic*] with dates of death from January 1, 1985 through December 31, 1993.

[*continued on next page*]

2. This Court's Opinion involves a legal issue of continuing public interest.

As a probate attorney, it is the considered opinion of the undersigned that the Court's decision has far reaching implications to the intestate estates of all decedent's [sic] who died between January 1, 1985 through December 31, 1993. This Court's decision will necessitate that the personal representatives of all intestate estates investigate whether the decedent ever had an adopted out child, and to locate and determine whether said adopted out child ever had any issue.

Since the law traditionally has been that a parent/child relationship is severed by an adoption, this decision now allows the issue of adopted out children to inherit from the natural parent of the adopted out child. This decision is clearly an important change in the law and should well warrant the official publication of this Court's Opinion.

Your consideration to this request is respectfully requested.

Sincerely,

[s]NORBERT R. BUNT

NRB/mb

[proof of service omitted]

[Hekman Letter - requesting publication]

LAW OFFICES
RALPH K. HEKMAN

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RIVERSIDE, CALIFORNIA 92501
AREA CODE 909
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FAX 684-2432

September 23, 1996

To the Honorable Justices of the
Court of Appeal For the State of California
Fourth Appellate District, Division Two
303 W. Fifth Street
San Bernardino, CA 92401

Re: Estate of Reedy - Case No. EO124711
Request for Publication re California
Rule of Court 978(a)

Your Honors:

I concur with the letter request of Norbert R. Bunt, Esq., that the Opinion rendered in the above-entitled matter be certified for official publication, and with each of the reasons stated in his letter in support thereof.

Your consideration to the request for certification for official publication is respectfully requested.

Sincerely,
[s] Ralph K. Hekman

RKH/k
[proof of service omitted]

[Senter Letter - requesting publication]

ERIKA W. SENTER

Attorney at Law

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tel (714) 854-5309
fax (714) 854-4897

September 25, 1996

TO THE HONORABLE JUSTICES OF THE
COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO
303 West Fifth Street
San Bernardino, CA 92401

RE: ESTATE OF REEDY E014711
REQUEST FOR PUBLICATION OF OPINION
PURSUANT TO CRC RULE 978

Your Honors:

With reference to the requests for certification of the Opinion for official publication made in this matter by Attorneys Norbert R. Bunt and Ralph K. Hekman, I herewith join that request.

In addition to all the reasons for requesting publication stated by Mr. Norbert R. Bunt, with which I concur fully, there are the following additional reasons for publication of this Opinion:

1. The Opinion makes a significant contribution to the legal literature by reviewing Probate Code, section 3, which has not yet been reviewed by any published opinion.

2. The Opinion criticizes existing legislation and recommends

changes, or clarification, in Probate Code, section 3 to resolve ambiguities or perceived conflicts with Probate Code, sections 6414 and 7000. To wit, at pages 16-17 of the Opinion, the court notes that section 6414 expressly makes the revised intestate code sections inapplicable to estates where the decedent died before 1985 and writes: "The absence of such a provision [regarding the 1991 and 1993 code amendments] could indicate an intent that subsequent amendments should govern all cases involving decedents who died after January 1, 1985, even in those cases where the decedent dies before the amendments take effect. ... We conclude that if the Legislature intended to change a rule as well established as the rule at issue in this case then it had an obligation to state its intent clearly and unequivocally and address and amend the code sections, such as Probate Code section 7000, which would be vitiated by the change."

3. The Opinion creates an apparent conflict in the law in that it applies the doctrine of "law of the case" notwithstanding the fact that there has been an intervening change in the law. The rule of law most often followed concerning the application of "law of the case" is that an intervening change in the law renders the procedural rule "law of the case" inoperative and justifies a revisit to the earlier ruling.

4. The Opinion is one of first impression concerning a legal issue that is of great continuing public interest. To wit, what effect a Supreme Court "decertification" order has on the "law of the case" rule.

For all these reasons, I join Mr. Bunt and Mr. Hekman in their request for publication of this Opinion and also respectfully request such publication.

Respectfully,

EWS/wts
[s]ERIKA W. SENTER
[proof of service omitted]

[Pinto Letter - objecting]

LAW OFFICES OF
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FAX; (714) 366-5962

September 30, 1996

TO THE HONORABLE JUSTICES
OF THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO
303 W. Fifth Street
San Bernardino, CA 92401

RE: ESTATE OF; EDNA CLARA REEDY
Appellate No. E-014711

RESPONDENTS' OBJECTIONS TO APPELLANTS' REQUESTS FOR PUBLICATION OF OPINION PURSUANT TO CRC RULE 978

Your Honors:

Appellants in the above-reference appeal have formally requested certification of the Opinion for official publication by and through their respective counsel. Respondents object to the Requests for Publication on the following bases:

1. The Opinion does not involve a legal issue of continuing public interest, inasmuch as the singular facts involved in the Estate of Reedy and issues of law applied thereto are almost completely confined to the unusual sequence of events related in the Opinion and thus would most probably not have any significant impact on any other past or present action.

2. Appellants' argument in their Requests for Publication that this

"Court's decision has far reaching implications to the intestate estates of all decedent's (sic) who died between January 1, 1985 through December 31, 1993", in the undersigned's opinion, is not only wholly inaccurate, but was in essence, and by direct implication, the same argument presented to the Hon. Judge Sullivan during the heirship trial, one of the very same arguments made and rejected in Reedy I to this Court and the Supreme Court, and now again thrust forward a second time based on the very same set of facts and laws at issue.

3. The effect and structure of the Opinion cannot be said to make a significant contribution by reviewing development of a common law rule, constitution provision, statute or other written law which could otherwise be effectively applied to other cases.

4. The Opinion cannot be argued to resolve nor create any apparent conflict in the law, rather, the Opinion evidences the Court's conviction that the Legislature did not express a clear intent that courts should apply law other than the law in effect at the time of the decedent's death to the question of who is entitled to inherit the estate of one who dies without a will. Thus, no review of the question as to whether a retrospective law would have been constitutional is even at issue, and publication would not advance any test of an issue not now relevant.

5. The Opinion does not modify nor criticize any existing Probate Code section, it merely applies the law this Court deems effective as it applies to this case. In Reedy I, neither this Court nor the Supreme Court ruled that the earlier ruling of the probate court was in error, and therefore, that matter being resolved in the prior appeal, leaves the interpretational effect of this Opinion directed to existing law which has been applied without any modification nor criticism of another rule of law. This Court has analyzed the effects of Probate Code §§3 and 7000 to a particularized scenario of facts set forth in Reedy. This Court has not, as Appellants argue, criticized existing legislation, but rather has applied that legislation it has deemed, in its judicial province, to be applicable. This same judicial function is inherent in most appeals, wherein one side argues applicability of one or multiple code sections, while the other side contends another rule of law should prevail.

6. The Opinion does not establish any new rule of law, it simply applies the existing law at the time of death to the facts attendant thereto.

Appellants' contention that this Court's Opinion creates an "apparent conflict in the law in that it applies the doctrine of 'law of the case' notwithstanding the fact that there has been an intervening change in the law" is the very same contention and argument Appellants' made in Reedy I, and now renew presently. Such a contention is non-meritorious because it does not accurately describe the effect of the Opinion, which does no such thing.

7. The Opinion does not apply an existing rule to a set of facts significantly different from those in any other published opinion.

Your consideration of Respondents' Objection to the Appellants' Requests for Publication is respectfully submitted.

RICHARD J. PINTO
Attorney at Law

RJP:kee
[proof of service omitted]

[Savord Letter - objecting]

GEORGE HUGH SAVORD
A PROFESSIONAL LAW CORPORATION
ATTORNEYS AT LAW

GEORGE HUGH SAVORD

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FAX # (909) 676-2222

September 30, 1996

To The Honorable Justices
of The Court of Appeal
For the State of California
Fourth Appellate District, Division Two
303 West Fifth Street
San Bernardino, California 92401

Re: **ESTATE OF: EDNA CLARA REEDY**
Appellate No. E-014711

RESPONDENTS' OBJECTIONS TO APPELLANTS' REQUESTS FOR PUBLICATION OF OPINION PURSUANT TO CRC RULE 978

Your Honors:

This office and Mr. Richard J. Pinto represent Respondents in the above captioned appeal. I adopt by reference and join the objections submitted to you this date by Mr. Pinto relative to Appellants' requests for certification of the Opinion for official publication.

Your Opinion on this appellate case concerns distinct facts, and you have held that the law

in effect at the time of decedent's death applied to determine the persons entitled to distribution of decedent's estate. It clearly appears that your Opinion is constrained to the facts and law of the case, and the affect(*sic*) concerns only the Appellants and Respondents.

"One of the functions of the preparation of a formal written opinion is to provide communication with people generally, since the appellate opinion is almost the sole mean of such communication by Appellate Justices." Witkin, Manual on Appellate Court Opinions (1977) §38, p. 64.

This case has no precedential value because it adds nothing to the body of general law of public interest, which is regrettable. Your Opinion does not establish a new rule of law or alter or modify an existing rule. It does not resolve or create an apparent conflict in the law. The case does not involve a legal issue of continuing public interest, nor does it criticize existing law. The Opinion will not make a significant contribution to legal literature, however urged for publication by Appellants.

Thus, the Opinion should not be published. California Rules of Court, Rule 976.

Respectfully submitted,

GEORGE HUGH SAVORD

GHS/mls

[proof of service omitted]

APPENDIX "F"
CALIFORNIA RULES OF COURT FOR PUBLICATION OF APPELLATE OPINIONS AND ITS ENABLING PROVISIONS

California Rules of Court, Introductory Statement

The Judicial Council is established under article VI, section 6, of the Constitution of California, and is given various powers and responsibilities to improve the administration of justice. ... *All of the California Rules of Court have the force of law.* Under its authority granted by article VI, section 6, of the Constitution to "make recommendations to the courts," the Judicial Council has adopted "Standards of Judicial Administration Recommended by the Judicial Council" ("standards").

_____o_____

Rules for Publication of Appellate Opinions

(Adopted by the Supreme Court of the State of California, effective January 1, 1964, pursuant to the authority contained in California Constitution, Article VI, Section 14; and Government Code Section 68895.)

Rule 976. Publication of Appellate Opinions.

(a) **[Supreme Court]** All opinions of the Supreme Court shall be published in the Official Reports.

(b) **[Standards for Publication of Opinions of Other Courts]** No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) resolves or creates an apparent conflict in the law;

(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by

reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

Amended Nov. 11, 1966; Jan. 1, 1972; Jan. 1, 1983.

(c) **[Publication Procedure]**

(1) **[Courts of Appeal and Appellate Departments]** An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b).

(2) **[Supreme Court]** An opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect.

Amended Nov. 11, 1966; Jan. 1, 1972; Jan. 1, 1983.

(d) **[Superseded Opinions]** Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part. *Relettered Jan. 1, 1972; amended Jan. 1, 1983; May 6, 1985.*

(e) **[Editing]** ... {*omitted as not relevant*} ...

Rule 976.1. Partial Publication.

(a) **[Partial Publication Authorized]** A majority of the court rendering an opinion may certify for publication any part of the opinion that meets the standard for publication specified under subdivision (b) of rule 976. The published part shall indicate that part of the opinion is unpublished. All material, factual and legal, that aids in the application or interpretation of the published part shall be in the published part.

Adopted Jan. 1, 1983.

(b) **[Other Rules Applicable]** For purposes of rules 976, 977, and 978, the published part of the opinion shall be treated as a

published opinion, and the unpublished part as an unpublished opinion.

Adopted Jan. 1, 1983.

(c) [Copy to Reporter of Decisions] One extra copy of both the published and unpublished parts of the opinion shall be furnished by the clerk to the Reporter of Decisions.

Adopted Jan. 1, 1983; amended Jan. 1, 1984.

Rule 977. Citation of Unpublished Opinions Prohibited;

(a) **[Unpublished Opinions]** An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) **[Exceptions]** Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

(c) **[Citation Procedure]** ... *{omitted as not relevant}* ...

Adopted Jan. 1, 1974; amended Jan. 1, 1983.

(d) **[Opinions Ordered Published by Supreme Court]** An Opinion of the Court of Appeal ordered published by the Supreme Court pursuant to rule 976 is citable.[1]

Adopted May 6, 1985.

Rule 978. Requesting Publication of Unpublished Opinions.

(a) **[Request Procedure; Action by Court Rendering Opinion]** A request by any person for publication of an opinion not certified for publication may be made only to the court that rendered the

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1. Any citation to the Court of Appeal opinion shall include reference to the grant of review and any subsequent action by the Supreme Court.

opinion. The request shall be made promptly by a letter stating concisely why the opinion meets one or more of the publication standards. The request shall be accompanied by proof of its service on each party to the action or proceeding in the Court of Appeal. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court shall transmit the request and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The transmitting court shall also send a copy of its recommendation and reasons to each party and to any person who has requested publication.

Adopted July 1, 1975; amended Jan. 1, 1983; July 1, 1992.

(b) **[Action by Supreme Court]** When a request for publication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion published or deny the request. The court shall send notice of its action to the transmitting court, each party, and any person who has requested publication.

Adopted July 1, 1975; amended Jan. 1, 1983.

(c) **[Effect of Supreme Court Order for Publication]** An order of the Supreme Court directing publication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion.

Adopted July 1, 1975.

Rule 979. Requesting Depublication of Published Opinions.

(a) **[Request Procedure]** A request by any person for the depublication of an opinion certified for publication shall be made by letter to the Supreme Court within 30 days after the decision becomes final as to the Court of Appeal. Any request for depublication shall be accompanied by proof of mailing to the Court of Appeal and proof of service to each party to the action or proceeding. The request shall state concisely reasons why the opinion should not remain published and shall not exceed 10 pages.

Adopted July 1, 1990.

(b) **[Response]** The Court of Appeal or any person may, within 10 days after receipt by the Supreme Court of a request for depublication, submit a response, either joining in the request or stating concisely reasons why the opinion should remain published. Any response shall not exceed 10 pages and shall be accompanied by proof of mailing to the Court of Appeal, and proof of service to each party to the action or proceeding, and person requesting depublication.

Adopted July 1, 1990.

(c) **[Action by Supreme Court]** When a request for depublication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion depublished or deny the request. The court shall send notice of its action to the Court of Appeal, each party, and any person who has requested depublication.

Adopted July 1, 1990.

(d) **[Limitation]** Nothing in this rule limits the court's power, on its own motion, to order an opinion depublished.

Adopted July 1, 1990.

(e) **[Effect of Supreme Court Order for Depublication]** An order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion.

Adopted July 1, 1990.

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ENABLING PROVISIONS IN CONSTITUTION OF CALIFORNIA

Constitution of the State of California, Art. VI, Sect. 6. The Judicial Council consists of the Chief Justice and one other judge of the Supreme Court, 3 judges of courts of appeal, 5 judges

of superior courts, and 5 judges of municipal courts, each appointed by the Chief Justice for a 2-year term; 4 members of the State Bar appointed by its governing body for 2-year terms; and one member of each house of the Legislature appointed as provided by the house. . . . To improve the administration of justice the [Judicial] council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, not inconsistent with statute. ...

Constitution of the State of California, Art. VI, Sect. 12.

(a) The Supreme Court may, before decision, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The court to which a cause is transferred has jurisdiction.

(b) The Supreme Court may review the decision of a court of appeal in any cause.

(c) The Judicial Council shall provide, by rules of court, for the time and procedure for transfer and for review, including, among other things, provisions for the time and procedure for transfer with instructions, for review of all or part of a decision, and for remand as improvidently granted.

(d) This section shall not apply to an appeal involving a judgment of death.

Constitution of the State of California, Art. VI, Sect. 14

The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

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